

Ibig @ David Rampas & Anor v Terisah Bahan & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
S-02-2038-12 OF 2014

ZAWAWI SALLEH, PRASAD ABRAHAM AND ZALEHA YUSOF JJCA
15 JULY 2016

B

Civil Procedure — Res judicata — Judgment — Respondents sought declaration for ownership of shares of company against appellant — Similar issue tried by court in separate action by respondents prior to present action — Whether present action tantamount to res judicata — Whether learned judicial commissioner erred when imposed onus on appellants to prove ownership

C

The first to fourth respondents were originally the registered owners of the fifth respondent, a company. However, based on the records of the company, one Onong bin Wan @ Fedelis Huan ('Onong') and one Monnah bt Guring ('Monnah') had become the only directors and shareholders of the fifth respondent in place of the first to fourth respondents. On 14 October 2008, the appellants were appointed as directors of the company in place of Onong and Monnah as the appellants had purchased the shares of the fifth respondent from Onong and Monnah. The first to fourth respondent then brought an action against the appellants seeking a declaration that the first to fourth respondents were the lawful owners of the shares of the fifth respondent. In defence, the appellants counterclaimed that the first to fourth respondents had ceased to be directors of the fifth respondent and the appellants were bona fide purchasers of the 100% issued and fully paid up shares in the fifth respondent. The trial court allowed the claim by the first to fourth respondents and dismissed the appellants counterclaim, hence this appeal. Prior to the present action, there was already a judgment dated 27 April 2010 on the same issue as the present action whereby the court declared that the appellants were the lawful shareholders and directors of the fifth respondent. Subsequent to the 27 April 2010 judgment, there was another separate action taken which also in relation with the same issue and the court in its judgment dated 15 January 2014 struck out the case as the issue had already been decided in the 27 April 2010 judgment. In the present appeal, the issues for consideration were with regard to res judicata and onus of proof on the purchase of shares by the appellants.

D

E

F

G

H

I

Held, allowing the appeal and setting aside the decision of the High Court with costs:

- A (1) There was no dispute that the judgment of 27 April 2010 was a default judgment. However, it is trite that a judgment, albeit a default judgment, shall remain valid until it is set aside (see para 20).
- B (2) It was clearly wrong for the first to fourth respondents to now trying to challenge the 27 April 2010 judgment in the present action by arguing that it was irregular and defective. They should have applied to set it aside in its original action. The failure of the first to fourth respondents to set aside the said judgment was fatal to their claim herein. Based on the said judgment, the appellants had been declared as lawful shareholders and directors of the fifth respondents. The fifth respondent, being a party to the said judgment was therefore bound by it. Consequently, since the fifth respondent itself was bound by the judgment, the learned judicial commissioner ('the JC') ought not to have granted any order which was inconsistent with that judgment (see paras 23–25).
- D (3) As the issue who were the shareholders and directors of the fifth respondent had been determined twice, it was undesirable for the court to allow that it be relitigated for the third time. To allow such would not only tantamount to an abuse of the process of the court but also could embarrass all parties involved, including the court and SSM. The court was of the view that the present action was clearly *res judicata* (see paras 30 & 33).
- E (4) Following the decision of the Court of Appeal in *Majujaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd & Ors* [1998] 2 MLJ 399, the onus was crystal clear on the first to fourth respondents to prove their ownership. The learned JC had therefore clearly misdirected himself when he imposed the onus onto the appellants whose names were already on the register (see para 35).
- F

G **[Bahasa Malaysia summary]**

Responden pertama hingga keempat adalah pada asalnya pemilik berdaftar responden kelima, sebuah syarikat. Walau bagaimanapun, berdasarkan rekod syarikat, satu Onong bin Wan @ Fedelis Huan ('Onon') dan Monnah bt Guring ('Monnah') telah menjadi satu-satunya pengarah dan pemegang saham responden kelima menggantikan responden pertama hingga keempat. Pada 14 Oktober 2008, perayu dilantik sebagai pengarah syarikat menggantikan Onong dan Monnah kerana perayu telah membeli saham responden kelima daripada Onong dan Monnah. Responden pertama hingga keempat kemudian membawa satu tindakan terhadap perayu memohon satu deklarasi bahawa responden pertama hingga keempat adalah pemilik sah saham responden kelima. Dalam pembelian, perayu menuntut balas bahawa responden pertama hingga keempat telah berhenti menjadi pengarah kepada responden kelima dan perayu adalah pembeli suci hati terhadap 100% saham yang dikeluarkan dan dibayar sepenuhnya terhadap responden kelima. Mahkamah perbicaraan

H

I

membenarkan tuntutan oleh responden pertama hingga keempat dan menolak tuntutan balas perayu, maka tuntutan ini. Sebelum tindakan ini, sudah terdapat satu penghakiman bertarikh 27 April 2010 atas isu yang sama seperti tindakan ini, yang mana mahkamah mengiystiharkan bahawa perayu adalah pemegang saham dan pengarah yang sah responden kelima. Berikutan penghakiman bertarikh 27 April 2010, terdapat satu lagi tindakan berasingan diambil yang mana juga berkaitan dengan isu yang sama dan mahkamah dalam penghakimannya bertarikh 15 Januari 2014 telah membatalkan kes kerana isu itu telah diputuskan dalam penghakiman bertarikh 27 April 2010. Dalam rayuan ini, isu untuk pertimbangan adalah berkaitan res judicata dan beban pembuktian terhadap belian saham oleh perayu.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos:

- (1) Tiada pertikaian bahawa penghakiman bertarikh 27 April 2010 adalah penghakiman ingkar. Walau bagaimanapun, ia adalah biasa bahawa satu penghakiman, walaupun satu penghakiman ingkar, akan tetap sah sehingga ia diketepikan (lihat perenggan 20).
- (2) Ia adalah nyata jelas salah untuk responden pertama hingga keempat mencabar penghakiman bertarikh 27 April 2010 dalam tindakan ini dengan menghujahkan bahawa ia adalah tidak teratur dan cacat. Mereka sepatutnya sudah memohon untuk mengetepikannya dalam tindakan asal. Kegagalan responden pertama dan keempat untuk penghakiman adalah serius kepada tuntutan ini. Berdasarkan penghakiman tersebut, perayu telah diisytiharkan sebagai pemegang saham dan pengarah yang sah bagi responden kelima. Responden kelima, yang menjadi pihak kepada penghakiman tersebut oleh itu terikat dengannya. Oleh kerana, memandangkan responden kelima terikat dengan penghakiman, pesuruhjaya kehakiman ('PK') tidak sepatutnya memberikan apa-apa perintah yang tidak konsisten dengan penghakiman itu (lihat perenggan 23–25).
- (3) Berkaitan dengan isu siapa yang merupakan pemegang saham dan pengarah responden kelima telah ditentukan dua kali, ia adalah tidak diingini bagi mahkamah untuk membenarkan ia dilitigasi semula untuk kali ketiga. Untuk membenarkan yang sebegitu adalah sama seperti penyalahgunaan proses mahkamah tetapi juga boleh memalukan semua pihak yang terlibat, termasuk mahkamah dan SSM. Mahkamah berpendapat bahawa tindakan ini adalah res judicata (lihat perenggan 30 & 33).
- (4) Mengikut keputusan Mahkamah Rayuan dalam kes *Majujaya Holdings Sdn Bhd v Pens-Transteeel Sdn Bhd & Ors* [1998] 2 MLJ 399, beban adalah nyata jelas terletak atas responden pertama hingga keempat untuk membuktikan pemilikan mereka. PK yang bijaksana jelas tersalah arah

- A apabila dia meletakkan beban atas perayu yang mana namanya sudah berada di dalam pendaftaran (lihat perenggan 35).]

Notes

- B For cases on judgment, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7970–7972.

Cases referred to

- Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, SC (refd)
- C *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, FC (refd)
- Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)
- Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, FC (refd)
- D *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184, SC (refd)
- Majujaya Holdings Sdn Bhd v Pens-Transtel Sdn Bhd & Ors* [1998] 2 MLJ 399, CA (folld)
- North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, QBD (refd)
- E *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 60, SC (refd)
- F *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713, HC (refd)

Legislation referred to

Companies Regulations 1966 Form 32A
Rules of the High Court 1980 O 13 r 6

- G **Appeal from:** Suit No K22-168 of 2010–11 (High Court, Kota Kinabalu)
- Chung Jiun Dau (Sonny Durai with him) (Allion Kitingan & Partners) for the appellant.*
- Saiful Azian Mokhtar (Marzuki Spawi with him) (Marzuki Spawi & Co) for the respondent.*
- H

Zaleha Yusof JCA:

- I [1] This is an appeal against the decision of the learned judicial commissioner ('the JC') of the High Court at Kota Kinabalu dated 24 October 2014, allowing, inter alia, the first to fourth respondents' (plaintiffs in the High Court) claim to remove the name of the appellants and restore the names of the first to fourth respondents as shareholders of the fifth respondent; in the share register.

BRIEF FACTS

[2] The first to fourth respondents and two others, Koh Han Ting ('Koh') and Nikomedis Binin ('Nikomedis'), were the registered owners of 100% of the issued and paid up capital of the fifth respondent comprising of 1000 ordinary shares.

[3] Sometimes in 1980, the State of Sabah offered to alienate a parcel of land situated in the District of Kota Belud and measuring approximately 2000 acres ('the said land') to the fifth respondent. Such offer was duly accepted by the fifth respondent but at that time the fifth respondent did not have the fund to pay for the necessary land premium.

[4] On 31 January 2007, the first respondent in her capacity as a director of the fifth respondent wrote to the Land and Surveys Department to renew the offer to alienate the said land. Another reminder was duly sent on 28 January 2009.

[5] Inquiries were subsequently made and they discovered that the offer to alienate the said land had been renewed by someone else. It was found that the names of the shareholders and director of the fifth respondent had been changed to the first and second appellants.

[6] It was the case of the appellants that they were bona fide purchasers of the said land when they purchased the shares from one Onong bin Wan @ Fedelis Huan ('Onong') and one Monnah bt Guring ('Monnah'). Onong and Monnah, according to the records of the company, had become directors of the fifth respondent in place of the first to fourth respondents and Koh and Nikomedis. The records show that Onong and Monnah are the only shareholders and directors of the company and the substantial asset for the company is the said land.

[7] It is also the appellants' case that by a letter dated 10 July 2008, the Land and Surveys Department made a fresh offer to alienate the land ('fresh offer letter') to the company and accepted by the company through Onong and Monnah. According to the fresh offer letter, it superseded the offer in 1980.

[8] Following the acceptance of the fresh offer letter, the company entered into a sale and purchase agreement dated 8 July 2008 to sell the land to the first appellant and also gave a power of attorney to the first appellant to deal with the land.

A [9] The first appellant paid the premium for the land to the Land and Survey Department.

B [10] On 14 October 2008, both the appellants were appointed as directors of the company in place of Onong and Monnah. On the same date, Onong and Monnah executed the Share Transfer Forms (Form 32A) to transfer their shares in the company to the two appellants.

C [11] The first to fourth respondents then filed the present suit, seeking amongst other things, a declaration, that the first to fourth respondents are the lawful owners of the shares of the fifth respondent; and the appellant do not have any interest whatsoever in the fifth respondent.

D [12] The appellants filed their defence and counterclaimed against the first to fourth respondents seeking for damages and declaration, inter alia, that the first to fourth respondents and Nikomedis Binin have ceased to be directors of the fifth respondent and the appellants are bona fide purchasers of the 100% of the issued and fully paid up shares in the fifth respondent.

E FINDINGS OF THE HIGH COURT

[13] The High Court allowed the first to fourth respondents' claim and dismissed the appellants' counterclaim.

F [14] The learned JC was of the view that the appellants had failed to show that they were bona fide purchasers for value. Although His Lordship agreed with learned counsel for the appellants that the Companies Commission of Malaysia ('SSM') record showed that both Onong and Monnah were the owner of the shares and they had sold the same to the appellants; however this was merely prima facie evidence. Those documents could not be the only indicators to show whether the appellants were the bona fide purchasers for value without notice. His Lordship felt that the appellants had failed to prove that they were bona fide purchasers for value without notice as there was no evidence of payment of the purchase price; there were questionable documentary evidence and the appellants did not call Onong and Monnah to explain.

OUR DECISION

I [15] There were many issues raised by the parties but we felt of much importance were issues on res judicata and onus of proof. Learned counsel for the appellants submitted that the issue of whether the appellants are director and shareholders of the fifth respondent was res judicata as the High Court at Kota Kinabalu in Originating Summon No K 24-40-2010-III had given a

judgment dated 27 April 2010 which declared the appellants ‘... at all material time were and are the lawful shareholders and director ...’ of the fifth respondent. Learned counsel for the appellants further contended that the JC had clearly erred in law when His Lordship reversed the onus of proof onto the appellants to show that Onnong and Monnah had legitimately purchased the shares from the first to fourth respondents; and although not expressly stating so; His Lordship appeared to draw an adverse inference against the appellants for failing to call Onong and Monnah as witnesses.

[16] In reply, learned counsel for the first to fourth respondents argued that the said judgment is not binding on the first to fourth respondents for the simple reason that the first to fourth respondents were not parties to the said originating summons and that the judgment was not decided based on the merits of the case. He cited the case of *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, wherein His Lordship Wan Suleiman FJ said:

In our judgement, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (Brydges v Brydges & Wood [1909] P 187 Re Shephard [1920] P 71 and Coleman v Coleman (1933-34) 61 IA 115). The terms ‘judgement’ and ‘order’ in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (see para 501 Halsbury Laws of England (4th Ed) Vol 26 at p 237). And at para 550 the following passages appear:

Subject to appeal and to being amended or set aside, a judgement is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.

(Emphasis added.)

[17] Since the first to fourth respondents herein were not parties to the judgment, he argued, the existence of the judgment cannot in law give rise to res judicata. Further, the judgment was not decided based on the merits of the claim but rather in default of the defendants in that earlier originating summons in entering appearance. It was merely a judgment or decision obtained by default of appearance. He further submitted that the judgment was manifestly wrong, irregular and defective as it was in breach of O 13 r 6 of the old Rules of High Court 1980; hence it is of no effect.

[18] Learned counsel for the first to fourth respondents also submitted that the learned JC was correct to first place the burden on the respondents to prove that the respondents were the owners of the shares and that the respondents did not sell their shares; as it is the appellants’ pleaded defence that they were bona fide purchasers for value of the shares which the appellants claimed they purchased from both Onong and Monnah, without notice of the first to fourth respondent’s interest.

- A [19] Upon scrutinising the grounds of judgment of the learned JC, we found that the issue of *res judicata* had not been considered by His Lordship although it is indeed an important issue and had been raised by the appellants in their defence as well as submissions in the High Court. Although the word ‘*res judicata*’ was not specifically used, the said judgment of 27 April 2010 was
- B pleaded in para 11.13 of the appellants’ amended defence. It was also raised as an issue for determination in para 37 (c) of the appellants written submission before the learned JC.
- C [20] Indeed, there is no dispute that the judgment of 27 April 2010 was a default judgment. However, it is trite that a judgment, albeit a default judgment, shall remain valid until it is set aside. As cited by learned counsel for the appellants, in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 at p 610, the Supreme Court stated:
- D We are of the considered view that an order of a superior court such as the High Court, even if it is eg, an order obtained *ex parte* or a default judgement; until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and ‘it is the plain and unqualified obligation of every person against, or in respect of
- E whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged’, per Romer LJ in *Hadkinson v Hadkinson*. This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd*. It was stated in *Isaacs v Robertson* that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and ‘these are not orders which
- F are void *ipso facto* without the need for proceedings to set them aside’. One of the reasons is that such a superior court must be presumed to have the jurisdiction to make an order which it has made. Every order made by a superior court must be regarded as an order of competent jurisdiction.
- G [21] Again, on the issue of default judgment, the Federal Court in the recent case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 (FC) held as follows:
- H [11] Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court 43AR was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud by them needed not to be proved by the appellants. But later, the trial court expressed an inconsistent opinion. At 52AR, the trial court held, so as to distinguish Tan Ying Hong, that the default judgement was not a specific finding that the first to fourth respondents committed fraud in the distribution of the estate of the deceased to themselves. With respect,
- I the judgment was the judicial decree that fraud by the first to fourth respondents had been made out. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 2 ALR 321, where

the High Court of Australia per Menzies J said ‘... the plaintiff’s cause of action against the insured would merge in the judgment once it was obtained ...’) and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd and Another Appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed ‘that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff’s rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead’). Until set aside, the default judgment was the incontestable proof of fraud the first to fourth respondents.

A

B

[22] By arguing that the said judgment of 27 April 2010 is irregular and defective, the first and fourth respondents seem to now trying to challenge it in this action. In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, Peh Swee Chin FCJ had at pp 417–418, stated the following:

C

It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action.

D

E

[23] Based on that decision of the Federal Court, it is clearly wrong for the first to fourth respondents to now trying to challenge the said judgment in this action by arguing that it is irregular and defective. They should have applied to set it aside in its original action ie the Originating Summons No K24–40–2010-III action. We took note that sometimes in 2013, they had also unsuccessfully attempted to, some three 1/2 years after the judgment was entered, amend the statement of claim in the present action to include a prayer to set aside the judgment dated 27 April 2010.

F

G

[24] The originating summon which resulted in the 27 April 2010 judgment was filed by the fifth respondent against six defendants to rectify its register of shareholders/members and directors; as these were claims by the defendants in that case that they were shareholders and directors. By that judgment, both the appellants had been declared as lawful shareholders and directors of the plaintiff ie the fifth respondent herein. The fifth respondent, being a party to that judgment of 27 April 2010, is therefore obviously bound by it. Consequently, we opine that since the fifth respondent itself is bound by the judgment, the learned JC ought not to have granted any order which is inconsistent with that judgment.

H

I

[25] Although the first to fourth respondents were not parties to the originating summon action but nevertheless they had notice of the said

- A judgment and for some five months prior to the filing of the present action, the first to fourth respondents failed to intervene and set aside the said judgment. The failure of the first to fourth respondents to set aside the said judgment, in our view, is fatal to their claim herein.
- B [26] This present case was heard before the learned JC from 24–29 August 2014 and decision was given on 24 October 2014. Before this case was even heard and disposed off, in another suit before Azhari Kamal JC in Kota Kinabalu High Court Suit No BKL-22–85/7 of 2013 between the first to fourth respondents herein and Klebang Plantation Sdn Bhd as the first defendant therein; and the fifth respondent and the appellants herein as the second, third and fourth defendants respectively, the learned Azhari Kamal JC had given a decision on 15 January 2014 wherein His Lordship had made a finding of fact at p 7, inter alia:
- C
- D In fact, the case No K24–40–2010–111, the court had made its decision on the issue of ownership of the shares on the second defendant in favour of the third and fourth defendants herein. This, in my opinion, has a bearing in the issue of locus standi of the plaintiff in bringing this action as well as the issue on the legality of the dealing in the said land between the first and the second defendant.
- E
- [27] The first to fourth respondents had filed an appeal against the said decision vide Court of Appeal Civil Appeal No S-02(1M)-285–02 of 2014, but the appeal was struck out on 19 May 2014 with costs of RM5,000 and they did not file any further appeal on the matter.
- F
- [28] If in the 27 April 2010 judgment, the first to fourth respondents were not parties, in this later 15 January 2014 decision, they were definitely parties. By his decision, the learned Azhari Kamal JC had also made a similar finding that the issue of who owns the shares in the fifth respondent had already been decided in favour of the appellants by the judgment dated 27 April 2010 in Originating Summons No K24-40–2010–III. Before the learned Azhari Kamal JC, the first to fourth respondents were in essence seeking to declare that the transaction entered by the fifth respondent through the appellants in respect of the land with Klebang Plantation Sdn Bhd was invalid, null and void. The first to fourth respondents alleged that the appellants were not the legitimate and lawful directors of the fifth respondents and therefore lack the authority and capacity to authorise and or cause the fifth respondent to enter into the agreement with Klebang Plantation Sdn Bhd.
- G
- H
- I [29] The learned Azhari Kamal JC had found that the issue having been decided, had a bearing on the locus standi of the first to fourth respondent bringing the suit as well as the legality of the transaction between Klebang Plantation Sdn Bhd and the fifth respondent. Accordingly the learned Azhari

Kamal JC held that the bringing of the action by the first to fourth respondents was ‘plainly and obviously vexatious and an abuse of the process of the court’ and the action was struck out. A

[30] By these two decisions, namely the 27 April 2010 judgment and Azhar Kamal JC’s decision, we are of the view that the matter before us now is clearly *res judicata*. B

[31] What is *res judicata* had been explained at length by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 197: C

What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgement becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. D E

[32] Abdul Malek J (as he then was) in the case of *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 at p 722 reading from the passage from ‘*The Doctrine of Res Judicata*’ (2nd Ed), originally authored by George Spencer Bower with the second edition by Sir Alexander Kingcome Turner said: F

The first, at para 46 at p 42 states:

A judgment or order by default is *prima facie* just as much a judicial decision in favour of the plaintiff as any other judgment or order, whether the default of the defendant was in appearance to the writ, or in pleading, or in appearance at the trial or hearing, or in prosecution of, or resistance to, an appeal. G

The second footnote on the same page reads:

In *Ker v Williams* (1885) 29 Sol Jo 681 CA, the dismissal of an action on default of appearance at the trial was held to be a ‘judgment’ which operated as an estoppel to the plaintiff’ (per Lindley LJ p 681). H

For *res judicata*, the parties need not be the same. It had been so held in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 (a firm) that: I

Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that the issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would be an abuse of process of

- A allow the issue to be relitigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out.
- B
- C [33] We feel as the issue of who were and are the lawful shareholders and directors of the fifth respondent had been determined twice, it is undesirable to allow that it be relitigated for the third time. To allow such would not only tantamount to an abuse of the process of the court but also could embarrass all parties involved, including this court and SSM (see the decision of the Supreme Court in *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184).
- D [34] Next is the issue of onus of proof. In *Majujaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd & Ors* [1998] 2 MLJ 399 at p 419, the Court of Appeal stated that:
- E In cases where the applicant is already on the register, he is entitled as a matter of law to remain there until he has transferred his shares or has been diverted of his right to be there by a court order. Contrary to the submission of counsel for the respondents, there is no onus on the registered shareholder to prove his ownership because the law presumes he has a right to be on the register. In this case, the trial judge misdirected himself by reversing the onus.
- F [35] It is without doubt and it is undisputed that the appellants are already on the share register of the fifth respondent, the company. The learned JC admitted this. The first to fourth respondents also admitted to this fact when in paras 2 to 3 of their amended reply and amended defence to counterclaim they recognised that from documents or records lodged with SSM, that Onong and Monnah were recorded as being the sole shareholder of the fifth respondent in 1983. They recognised that appellants names were already on the share register and that their names had to be removed when they sought for rectifications of the share register of the fifth respondent to remove the appellants names as shareholders and to restore the first to fourth respondents as ones. Hence,
- G following the decision of the Court of Appeal in *Majujaya Holdings*, the onus is crystal clear on the first to fourth respondents to prove their ownership. The learned JC had therefore clearly misdirected himself when he imposed the onus onto the appellants whose names were already on the register. This can be seen
- H from His Lordship grounds of judgment at pp 22, 53 and 54 of the supplementary record of appeal.
- I Surely since the second and third defendants say that they bought their shares from Onong and Monnah, it is incumbent upon the second and third defendants to show that they were bona fide purchasers of their shares.

Onong and Monnah are important and essential witnesses and their evidence are very crucial to the unfolding of the narrative, how they had acquired their shares from the plaintiffs and how they transferred the same to the second and third defendants.

A

I am of the opinion that the second and third defendant should have called Onong and Monnah as witnesses.

B

[36] In the light of the above grounds, we unanimously found there were merits in this appeal. With due respect to the learned JC, we found there was clearly a misdirection on His Lordship's part on principles of res judicata and onus of proof. In fact, His Lordship seemed to have shunned the issue of res judicata completely. Hence, we felt that the learned JC erred in law in not having sufficient and judicial appreciation of this issue. We, therefore, allowed the appeal and set aside the decision of the High Court with costs.

C

Appeal allowed and decision of the High Court set aside with costs.

D

Reported by Dzulkarnain Ab Fatar

E

F

G

H

I